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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: AUG 05 2003

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds or that he would create the necessary employment.

On appeal, the petitioner submits a new business plan, bank statements, and invoices.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, Ecoh International, Inc., located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between

the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
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> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
> >
> > (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the petition, the petitioner claimed to have invested $140,000 on February 16, 2002, and $1,129,235.37 total. The petitioner claimed to own 50 percent of the company. The petitioner submitted no supporting evidence. On October 9, 2002, the director requested additional documentation of the petitioner's investment.

In response, the petitioner submitted [redacted]s certificate of corporation reflecting that the corporation filed its articles of incorporation on December 5, 1997. The petitioner also submitted unaudited financial statements as of October 31, 2002, reflecting $1,000 stock, and $2,156,719.53 in additional paid-in-capital. No shareholder loans are listed under the corporation's liabilities. The same accountant prepared "financial statements" reflecting the deposits and withdrawals from the corporation's account. In addition to a few minor deposits from a credit line, these statements reflect the following deposits:

January 2002: $1,820 from an unidentified source and $139,974 from [redacted]

February 2002: $264,965 from [redacted] and $283,759.62 from [redacted]

March 2002: $44,974 from the petitioner, $44,974 from [redacted] $744,860.60 from [redacted] $99,974 from [redacted] and $800 from an unidentified source.

April 2002: $199,972 from [redacted] and $399,948 from [redacted]

May 2002: $209,982 from [redacted] $826,601.54 from [redacted] and $50,451 from an unidentified source.

June 2002: $699,881.20 from [redacted] and $249,974 from [redacted]

July 2002: $89,979 from [redacted] $109,974 from [redacted] $361,450 from [redacted] and a $37,070 "shareholder loan."

August 2002: $808,399.26 from [redacted] $335,253.86 from [redacted] and a $28,000 "shareholder loan."

September 2002: $299,974 from [redacted] $150 from an unidentified source, and $202,072 from [redacted]

October 2002: $159,950 from [redacted] $199,978 from [redacted] and $1,000 from an unidentified shareholder.

The May statement reflects a $51,000 debit characterized as a loan to a shareholder.

The director concluded that the unaudited financial statements were not evidence that [redacted] was doing business. On appeal, the petitioner submitted a letter from one of its suppliers, [redacted] redit confirmation notices, invoices, and bills of lading. In addition, as will be discussed more below, the petitioner submitted a corporate resolution from [redacted] ndicating it was funding the petitioner's investment.

The credit confirmation notices confirm many of the deposits listed above. The invoices reveal that [redacted] and [redacted] are customers of [redacted] January and May 2002 are the only months where [redacted] transferred more money to [redacted] than the contract price for the frozen chicken it was purchasing. In many months, [redacted] transferred less. For example, in January, [redacted] transferred $139,974 to [redacted] but the record only reflects $42,949.13 in purchases. Similarly, in May 2002, Ozay Uluslararsi transferred $826,601.54 to [redacted] but the record only reflects $738,309.30 in purchases from [redacted] By contrast, in April 2002 [redacted] purchased $955,753.60 in frozen chicken and other goods from [redacted] but transferred only $399,948 to [redacted]

Purchases by a customer, even a customer owned by a shareholder, cannot be considered a capital investment by that customer. First, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Second, even if we accepted the corporate resolution as gifting $1,000,000 to the petitioner without any obligation on the petitioner's part to repay those funds, the record contains no evidence that Ozay Uluslararsi transferred $1,000,000 to Ecoh International as the petitioner's capital, as opposed to payment for goods purchased.

The only funds attributed to the petitioner on the financial statements are $44,974 in March 2002. The petitioner did not submit a credit confirmation for that deposit to support information claimed on the financial statement. Thus, the unaudited balance sheet as of October 31, 2002, reflecting $1,000 stock and $2,156,719.53 in additional paid-in-capital is not supported by the record. Moreover, the balance sheet is not credible. It does not reflect any shareholder loans or loans to shareholders. Yet, the same accountant who prepared the balance sheet prepared the financial statements that reflect a $51,000 loan to a shareholder and $65,070 in loans from shareholders. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We note that [redacted] was formed in 1997. Yet, the petitioner has not submitted any tax returns for the corporation that might establish its ownership and shareholder equity. While the petitioner claims on the petition to be a 50 percent owner, the record contains evidence that contradicts that assertion. With the second response to the director's request for additional documentation, the petitioner submitted a January 18, 2002 corporate resolution whereby the sole shareholder, director, and officer [redacted] appointed the petitioner as President. With the initial response to the director's request for additional documentation, the petitioner submitted a single page of corporate minutes dated February 6, 2002. These minutes also identify [redacted] as the sole shareholder and director. The record does not resolve this issue.

In light of the above, the petitioner has not demonstrated a personal investment of $1,000,000 into [redacted]

SOURCE OF FUNDS

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted no documentation. In response to the director's request for additional documentation, the petitioner submitted a bank letter dated December 24, 2002, asserting: "As the partner of [redacted] conducting international trade, [the petitioner] has many business transactions with our bank." The letter continues that the value of the transactions "exceeds $19,650,000U.Sdollars [sic]." The letter concludes that the petitioner has a balance above $600,000 and a credit line of $350,000. The

petitioner also submitted a list of properties sold by the petitioner and [redacted] in Turkey, and another list of properties sold by [redacted] of which the petitioner is "a signature authorized administrator."

The director concluded that the bank letter and list of properties sold by [redacted] were insufficient evidence of the source of the money deposited with [redacted] The director noted the lack of evidence regarding the petitioner's personal income.

On appeal, the petitioner submitted what appears to be similar to a corporate resolution by [redacted] agreeing to provide a $2,000,000 "endorsement" to the petitioner and [redacted] to found a United States company; an [redacted] bank statement for January of an unidentified year; and the credit confirmation notices for 2002 discussed above.

As stated above, the record does not support the assertion that [redacted] contributed $1,000,000 as the petitioner's equity in [redacted] The only money [redacted] contributed to [redacted] appears to be the purchase price for goods sold to [redacted] The record certainly does not reflect that [redacted] transferred $2,000,000 above and beyond the price of goods it purchased.

While we concur with the director that the petitioner has not established his personal income, the issue is moot as the petitioner does not claim, and the record does not reflect, that he personally infused $1,000,000 of his own savings into [redacted]

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the

> United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Finally, 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply

> sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

On the petition, the petitioner indicated that [redacted] had one employee and would create an additional three jobs. Initially, the petitioner submitted no evidence regarding this issue. In response to the director's request for additional documentation, counsel asserted that the petitioner intended to recruit five to six employees in six months with a total of no less than ten employees by March 2004. The petitioner submitted a five-page business plan that fails to discuss employment projections over the next two years, a Member Profile Sheet from the Orlando Regional Chamber of Commerce reflecting that [redacted] had two full-time and no part-time employees, and a City of Casselberry occupational license for [redacted] issued July 13, 2002, reflecting approval for one to five employees.

The director concluded that the business plan was insufficient. On appeal, the petitioner submits a more detailed business plan. The business plan indicates that Ecoh International "exports its products through another company, [redacted] The plan further indicates that it intends to expand, first by leasing a cold storage facility in Savannah, Georgia; second by leasing seven to ten trucks to carry its products from suppliers to the port; third by introducing an appliance product line; and fourth by introducing concentrated and natural juices to the Turkish markets. The plan continues that [redacted] will require one supervisor and three employees to operate the cold storage facility; a supervisor, two employees, and seven to ten drivers for the transportation department; and a manager and employee in the Human Resources department.

The record does not support this business plan as credible. The petitioner has not demonstrated any contractual commitments or even negotiations to purchase or rent a cold storage facility. Nor has the petitioner demonstrated the feasibility of hiring drivers to pick up goods from its suppliers. If the supplier has its own fleet of drivers, it is not clear that it would allow drivers from another company onto its lot to pick up goods. The record contains no contracts with suppliers agreeing to this arrangement.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

[redacted]

ORDER: The appeal is dismissed.